No. 93-5418

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ORRIN SCOTT REED,

Petitioner,

v.

ROBERT FARLEY, Superintendent, Indiana State Prison, and PAMELA CARTER, Attorney General Of Indiana,

Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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I. THE IAD IS A "LAW [ ] . . . OF THE UNITED STATES" WITHIN THE MEANING OF THE HABEAS CORPUS STATUTE.

Respondents' new jurisdictional argument lacks merit. (R. Br. 13-21.) In *Carchman v. Nash*, 473 U.S. 716, 719 (1985), alerted to the jurisdictional issue by an amicus brief in which Indiana participated,[1/] this Court held that habeas corpus jurisdiction extended to the IAD: "The [IAD] is a congressionally sanctioned interstate compact within the Commerce Clause, U.S. Const., Art. I, § 10, cl. 3, and thus is a federal law subject to federal construction." Based on *Carchman*, the United States concludes that jurisdiction exists. (Amicus Br. 11 n.5.) Indeed, in their opposition to certiorari, Respondents themselves relied on *Carchman* for the strong (and accurate) statement that "[t]here is no question that the IAD is a federal law which can be the basis for federal *jurisdiction* . . . ." Opp. at 10 (emphasis in original).[2/] *See also Fex v. Michigan*, 113 S. Ct. 1085 (1993) (certiorari granted under 28 U.S.C. § 1257 to review the Michigan Supreme Court's interpretation of the IAD).

II. *STONE v. POWELL* DOES NOT APPLY TO BAR CATEGORICALLY FEDERAL COLLATERAL REVIEW OF IAD SPEEDY TRIAL CLAIMS.

Citing *Stone v. Powell*, 428 U.S. 465 (1976), Respondents would have this Court bar, categorically, all IAD claims from federal habeas corpus review. (R. Br. 21-34.) In making this

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1/ See Brief of the Amici Curiae States at ii n.3, filed in *Carchman*.

2/ Respondents also relied on *Carchman* in the court of appeals, where they conceded: "There is no question that a federal court has jurisdiction under 28 U.S.C. § 2254 to entertain a claim that the [IAD] has been violated . . . ." (Appellees' Br. at 6.) The cases they cite on territorial legislation and on unrelated compacts, all substantially predate *Carchman*; not one addresses the IAD. Those cases do not provide even a colorable basis for questioning this Court's jurisdictional holding in *Carchman*.

argument, Respondents overlook the actions of Indiana in this matter, which amply demonstrate the need for collateral review. Here, the local officers of Indiana's executive and judicial branches signed a Request for Temporary Custody stating that they "propose[d] to bring [Petitioner] to trial on this information within the time specified in Article IV(c) of the Agreement." (J.A. 4-6.) Both the judge and the prosecutor then completely ignored the 120-day time limit of Article IV(c), even though Petitioner, effectively without counsel or access to a law library while in jail, made several requests for a timely trial. On appeal, the Indiana Supreme Court refused to enforce the IAD; despite the fact that Congress made the Article IV(c) 120-day trial deadline automatic ("trial shall be commenced within 120 days of the arrival of the prisoner in the receiving State"), and despite Petitioner's three written requests for a timely trial during the 120-day period (J.A. 56, 88, 91), the Indiana Supreme Court concluded that Petitioner had waived that deadline. (J.A. 157.) By thus holding a *pro se* defendant to a much higher standard of compliance with the IAD than either the prosecutor or the trial judge, Indiana has evidenced hostility to Petitioner's federal rights and has demonstrated why collateral review must remain available.

A. Respondents Provide No Rational Justification For Creating A Categorical Bar To Federal Review.

Because the IAD is a "law[ ] . . . of the United States," review of state compliance with the IAD falls within the scope of federal habeas corpus jurisdiction created by Congress. 28 U.S.C. § 2254. Congress reemphasized the federal courts' enforcement role in the IAD itself, specifically providing that "[a]ll courts . . . of the United States . . . are hereby directed to enforce the agreement . . . ." 18 U.S.C. app. § 5. This stands in stark contrast to *Stone*, where this Court was free to shape or limit the contours of the exclusionary rule because this Court created that rule in the first place. *See Stone*, 428 U.S. at 482-83 (detailing judicial creation of the exclusionary rule); *see also id.* at 500 (Burger, C.J., concurring) ("the same authority that empowered the Court to supplement the [fourth] amendment by the exclusionary rule a hundred and twenty-five years after its adoption, likewise allows it to modify that rule as the 'lessons of experience' may teach" (internal quotations omitted)). Where, as here, Congress enacted the rule, however, this Court is more constrained. *See Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1727 (1992) (O'Connor, J., dissenting) ("While we may deprive portions of our own prior decisions of any effect, we generally may not, of course, do the same with portions of statutes.").

Respondents attempt to avoid this constraint by emphasizing the equitable nature of habeas corpus, but they ignore the fact that the categorical bar they seek is antithetical to the exercise of equitable discretion. The categorical bar of *Stone* is justified because the exclusionary rule is "necessarily divorced from the correct ascertainment of guilt," *see Withrow v. Williams*, 113 S. Ct. 1745, 1753 (1993): each time the exclusionary rule is applied, it keeps relevant evidence (illegitimately obtained) from the finder of fact. The same is not true of the IAD's 120-day limit for trial. Delay leads to reduced accuracy in ascertaining guilt. *See, e.g., Doggett v. United States*, 112 S. Ct. 2686, 2692 (1992); *Barker v. Wingo*, 407 U.S. 514, 532 (1972); *see also Smith v. Hooey*, 393 U.S. 374, 379-80 & n.11 (1969).

When Respondents ask whether a trial held 121 days after transfer is any less sound than one held 120 days after transfer (R. Br. 30), they ask the wrong question. The relevant question is whether in the long run a system that permits late trials will be less reliable than a system that mandates speedy trials. *See Withrow*, 113 S. Ct. at 1753. The answer this Court has given in *Doggett*, *Barker*, and *Smith* is "yes." More important, *Congress* has decided that 120 days is the maximum time a state can make an IAD transferee wait for trial (absent a showing, in open court with the detainee or his counsel present, of good cause for delay, which was not made here).

Respondents' argument that Indiana's voluntary participation in the IAD insulates it from review (R. Br. 25) does not withstand analysis. Indiana has decided to participate in an interstate compact, from which it obtains benefits and in which it undertakes obligations. While it is true that Indiana could withdraw from the IAD and thereby free itself of Articles IV(c) and V(c), at least prospectively,[3] it would no longer be able to obtain custody of prisoners through the IAD. There is nothing "peculiar" about requiring a state to obey Congress's mandate when that state takes advantage of a benefit conferred by federal law. *See, e.g.*, *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990) (although participation in the federal Medicaid program is voluntary, participating states must comply with the federal Medicaid Act's requirements); *King v. Smith*, 392 U.S. 309, 316 (1968) (although participation in the federal program for Aid to Families with Dependent Children is voluntary, participating states must administer program in accordance with federally-approved plan).

Congress enacted the IAD in part to protect the rights of prisoners transferred under detainers. Respondents' argument to the contrary (R. Br. 27-29) overlooks *Carchman* ("Congress . . . enacted the Agreement in part to vindicate a prisoner's constitutional right to a speedy trial," 473 U.S. at 731 n.10); *Cuyler v. Adams* (the IAD established "procedures that ensure protection of the prisoner's speedy trial rights," 449 U.S. 433, 435 n.1 (1981)); the Senate Report on the IAD ("the enactment of this legislation would afford defendants in criminal cases the right to a speedy trial," S. Rep. No. 1356, 91st Cong., 2d Sess. at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4864); and the IAD itself (the IAD is intended to address "difficulties in securing speedy trial of persons already incarcerated in other jurisdictions," Art. I,

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[3] The IAD states: "the withdrawal of any State shall not affect the status of any proceedings already initiated by inmates or by State officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof." Art. VIII, 18 U.S.C. app. § 2.

18 U.S.C. app. § 2; and *see generally*, Art. VIII, *id.*, discussing the "rights" of "inmates" under the IAD). Indiana cannot use the IAD to obtain prisoners without treating them in accordance with the dictates of Congress.[4]

Respondents' argument that the 120-day period was intended solely to benefit sending states does not withstand scrutiny. Respondents do not explain what interest of the sending state would justify requiring that the receiving state dismiss its charges with prejudice if the transferee is not tried within 120 days. If it were the sending state's interest alone that Congress is vindicating in Articles IV(c) and V(c), surely the IAD would provide a mechanism whereby the sending state could waive that interest in deference to its sister state's interest in pursuing prosecution. Moreover, the Indiana Supreme Court takes the view that the IAD protects transferee prisoners' speedy trial rights; it has held "that Ind. R. Cr. P. 4 [Indiana's speedy trial rule] does not apply when the IAD statute is applicable." *Williams v. State*, 533 N.E.2d 1193, 1195 (Ind. 1989). Plainly, the dismissal with prejudice is directed to protect the speedy trial rights of prisoners who have been transferred pursuant to the IAD; dismissal is the only appropriate remedy for speedy trial violations. *See Strunk v. United States*, 412 U.S. 434, 439-40 (1973); *Barker*, 407 U.S. at 522.

Respondents' argument that the IAD does not protect a fundamental right because it has a good cause exception and harsh

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[4] Respondents' fallback argument, that the IAD's "mechanism of transfer" solves any potential speedy trial problem, also fails. (R. Br. 29.) A system that provides for the transfer of inmates without directing that such inmates be brought to trial within a certain period would still permit the violation of speedy trial rights. The drafters of the IAD and Congress recognized this fact and therefore adopted the 120-day time limit in conjunction with the remedy for violation of dismissal with prejudice. Arts. IV(c), V(c), 18 U.S.C. app. § 2.

remedy (R. Br. 26-27) is incorrect.[5] To the contrary, these features define the very profile of statutes enacted to protect fundamental speedy trial rights. Indiana's own speedy trial rules fit the same profile as the IAD and, according to the Indiana Supreme Court, thereby vindicate the Sixth Amendment right to a speedy trial -- "one of the most basic rights preserved by the Constitution." *See Fossey v. State*, 258 N.E.2d 616, 618 (Ind. 1970). Under Indiana's Criminal Rule 4(B), a defendant in jail pending trial has a right to request an early trial; once a defendant makes such a motion,

> he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy (70) calendar days because of the congestion of the court calendar.

Ind. R. Cr. P. 4(B)(1) (West 1994). As the Indiana courts have recognized in discharging defendants under Rule 4(B), the "right to a speedy trial is an amorphous concept, the violation of which is not susceptible to precise determination," which is precisely why it is necessary "to provide clarity by specifying in more definitive terms the point at which a defendant's . . . right to a speedy trial

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[5] The fact that the United States amended the IAD to permit dismissal without prejudice under certain circumstances does not reflect the unimportance of the right. (R. Br. 26 n.11.) Indeed, this amendment was made with the anti-shuttling provisions of the IAD in mind, and had nothing to do with the speedy trial right. Congress amended section 9 of the IAD because the policy behind the anti-shuttling provision is not necessarily implicated when inmates are transferred between federal and state custody, as "the transfer may only involve the defendant being taken across the street from the state court to the federal court." 134 Cong. Rec. S17,371 (Nov. 10, 1988 (bill analysis); *see also* 134 Cong. Rec. H11,254 (Oct. 21, 1988) (same); 134 Cong. Rec. S7451 (June 8, 1988) (same). Had Congress actually concluded that the speedy trial right is not important, as Respondents suggest, it would have abolished the 120-day trial limit, substantially increased that limit, or provided only for dismissal without prejudice.

can be said to have been abridged and discharge is required." *Crosby v. State*, 597 N.E.2d 984, 988 (Ct. App. Ind. 1992). This is exactly what the IAD accomplishes, when it is enforced.[6]

B. The Institutional Costs Of Federal Collateral Review Are Neither Unexpected Nor Substantial.

The "cost" of federal collateral review was known to Indiana in 1973 when it signed the IAD, both from section 5 of the IAD (which specifies federal court enforcement) and from existing habeas corpus case law.[7] As it has participated in the IAD now for twenty years, during which time habeas review of IAD claims has been a given, Indiana's argument that such review may create an "incentive for States to opt out of participation in the IAD" (R. Br. 33) is a bluff -- especially since the *Stone* categorical bar analysis originated with the court of appeals *sua sponte*, and not with Respondents.[8] Furthermore, in enforcing the IAD, this Court need not concern itself with whether Indiana would rather withdraw from the IAD than apply its provisions faithfully; that decision rests with the Indiana legislature.

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[6] In fact, Indiana has addressed the problem by interpreting its own constitutional speedy trial right to require a specified time limit, so that a violation of Criminal Rule 4 "is considered a *per se* denial of the [state constitutional] speedy trial right." *Fossey*, 258 N.E.2d at 619. If no demand is made under Rule 4(B), Indiana must try a defendant within one year of filing charges or discharge him. Ind. R. Cr. P. 4(C); *see also Huffman v. State*, 502 N.E.2d 906, 908-09 (Ind. 1987) (discharging felony charges against convicted defendant because state did not try him within one year).

[7] By 1973, there were published decisions involving habeas corpus challenges brought under the IAD. *See, e.g., United States v. Pennsylvania*, 429 F.2d 522, 523-24 (3d Cir. 1970); *Kane v. State of Virginia*, 419 F.2d 1369, 1373-74 (4th Cir. 1970).

[8] No other state has sought leave to file an amicus curiae brief in support of Indiana in this case.

In assessing the "costs" of habeas review, Respondents include the dismissal of charges against persons whose IAD speedy trial rights were violated. (R. Br. 32.) This assessment is erroneous; because successful petitions establish that the state has violated federal rights, successful petitions are "costs" of the state's unlawful conduct rather than "costs" of federal collateral review.

Experience teaches that the actual "costs" of collateral review in IAD cases are small. Congress adopted a "bright-line" test in the IAD specifically to reduce states' "costs" by "diminish[ing] the possibility of convictions being vacated or reversed because of a denial of [the speedy trial] right." S. Rep. No. 1356, at 1. Forty-eight states have signed the IAD; not one has withdrawn because of the costs of federal collateral review.

This Court should refuse to extend *Stone* to bar categorically federal collateral review of IAD claims.

III. THERE IS NO JUSTIFICATION FOR REQUIRING A "COMPLETE MISCARRIAGE OF JUSTICE" BEFORE GRANTING RELIEF UNDER 28 U.S.C. § 2254 ON A PROPERLY PRESERVED CLAIM THAT THE IAD HAS BEEN VIOLATED.

This Court has never applied a "miscarriage of justice" standard in evaluating a properly preserved and presented petition for relief under section 2254. That standard is reserved for section 2254 petitioners who either have abused the writ or have not only procedurally defaulted their claims, but have also failed to excuse their default under the cause and prejudice test. Respondents' argument that the "miscarriage of justice" standard should apply to section 2254 petitions because it applies to section 2255 motions (R. Br. 34-40) is without merit: as is true in every one of Respondents' key section 2255 cases, issues presented in section 2255 motions almost always were or could have been presented to the same courts at trial and on direct review; section 2254, in contrast, exists to provide plenary federal review to state prisoners where federal rights are at stake.

A. State Prisoners With IAD Speedy Trial Claims Should Not Be Required To Show A Miscarriage Of Justice To Obtain Relief.

The importance Congress placed on the 120-day time limit for trials under the IAD cannot be denied. Respondents concede that the IAD requires automatic dismissal of the charges against a prisoner not timely tried, without a showing of prejudice. (R. Br. 38 n.17.) And though Respondents ignore it, Congress has directed, in section 5 of the IAD, that all federal courts enforce the provisions of the IAD. 18 U.S.C. app. § 5. Yet, despite the importance Congress has placed on this federal right, Respondents argue for a standard that will all but neutralize efforts to enforce that right on habeas review.

Specifically, Respondents argue that properly preserved and presented section 2254 claims alleging a violation of federal "laws" should be subject to a "miscarriage of justice" standard, which is far more stringent than the standard applied to properly preserved and presented section 2254 claims alleging constitutional violations. There is, of course, no basis for this argument in section 2254 itself; Congress does not distinguish between "the Constitution or laws . . . of the United States." 28 U.S.C. §§ 2241, 2254. *See generally National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798, 805 (1994) (refusing to impose "a requirement of economic motive neither expressed nor . . . fairly implied in the operative sections of the [RICO] Act"); *cf. Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39 (1979) (statutory language "business or property" must be construed to give full meaning to both terms). The Supremacy Clause dispels the notion that rights established by federal laws are entitled to less protection from state violation than constitutional rights: "This Constitution, and the Laws of the United States . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." U.S. Const. art. VI, § 2. Furthermore, in *Davis v. United States*, 417 U.S. 333, 346 (1974), this Court squarely rejected this very distinction

for section 2255, denying that "any line could be drawn on the basis of whether the claim had its source in the Constitution or in the 'laws of the United States.'"

Respondents contend that the miscarriage of justice standard is appropriate for properly preserved and presented section 2254 claims based on violations of federal "laws" because that standard is used to evaluate section 2255 challenges to federal convictions for violations of federal "laws." (R. Br. 34-37.) But Respondents fail to note that this standard also applies to section 2255 claims based on alleged constitutional violations[9] -- yet it does not apply to section 2254 constitutional claims that have been properly preserved and presented. Respondents' arguments are flawed because they fail to acknowledge the very fundamental differences between section 2255 motions and section 2254 petitions, which make the standard appropriate for section 2255 motions inappropriate for any properly preserved and presented section 2254 claims.

Collateral challenges to federal convictions implicate different interests than collateral challenges to state convictions; consequently, different standards apply for issuing relief. While it is true, as *Davis* states, that "*the grounds for relief* under § 2255 are equivalent to those encompassed by § 2254," 417 U.S. at 344 (emphasis added) -- which is to say that both section 2254 and section 2255 authorize collateral relief for "violations of the Constitution or laws . . . of the United States" -- that does *not* mean that the standards for establishing a right to relief under these two statutes are or should be the same.[10]

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[9] *See* cases cited, *infra*, n.11.

[10] Respondents quote too small a snippet from *Davis* when they assert that "collateral review does not reach 'every asserted error of law.'" (R. Br. 34.) The *Davis* Court actually said that "[not] every asserted error of law can be raised on a § 2255 motion." 417 U.S. at 346. The full quotation from *Davis* supports Petitioner's interpretation of that case -- that *Davis* concerned a procedural (continued...)

Congress established section 2254 habeas corpus relief for state prisoners to stand as a safeguard to ensure vindication of substantial federal rights for persons convicted in state courts that are potentially hostile to, or neglectful of, those federal rights -- as the Indiana courts were here. *Reed v. Ross*, 468 U.S. 1, 10 (1984) (Congress enacted section 2254 to make federal courts serve as "guardians of the people's federal rights" (citation omitted)). In contrast, section 2255, which addresses federal convictions, does not exist to protect criminal defendants from a forum potentially hostile to the petitioner's federal rights. To the contrary, Congress requires that section 2255 motions be brought before "the court which imposed the sentence," 28 U.S.C. § 2255, as "a further step in the movant's criminal case and not a separate civil action." Advisory Comm. Note, Rule 1 Governing Section 2255 Proceedings.

As a section 2255 motion is presented to the original trial court, its primary function is to permit that court to address matters that were not, and could not have been, addressed at trial or on direct appeal. *See* Larry W. Yackle, *Postconviction Remedies* § 108, at 422-23 & nn.81-84 (1981 & Supp. 1993) (noting "general rule" that "section 2255 motions will be dismissed summarily if they raise claims that were or might have been asserted on direct review," with an exception where a miscarriage of justice would result); 2 James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 36.7, at 569 & nn.38, 39 (1988) ("by contrast to habeas corpus actions, in which federal review of federal *legal* questions is plenary and *de novo*, the general -- albeit judge-made -- rule in section 2255 actions is that postconviction review of any sort is not needed or available as to claims previously rejected on their merits on direct appeal"); *id.* § 36.4, at 554 & n.5 (noting that

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[10] (...continued)
requirement applicable to section 2255 motions, and did not address section 2254 habeas petitions based on a violation of one of the "laws . . . of the United States."

claims "that the [section 2255] movant could have but did not raise on appeal" also generally are barred). Significantly, courts apply this "general rule" regardless of whether the section 2255 motion presents violations of federal law or of the federal constitution.[11/]

In each of Respondents' key cases, the issues raised by section 2255 motion "were or might have been asserted on direct review." Consequently, the movants in each were forced to address the "miscarriage of justice" standard. *See United States v. Timmreck*, 441 U.S. 780 (1979) (movant who pleaded guilty and failed to challenge on direct appeal the sentencing judge's failure to inform him of mandatory special parole term in violation of Fed. R. Crim. P. 11); *Davis v. United States*, 417 U.S. 333 (1974) (movant allowed to assert on collateral review a claim that had been raised and decided against him on direct review where intervening change in substantive criminal law otherwise would have caused a miscarriage of justice); *Hill v. United States*, 368 U.S. 424 (1962) (movant had not requested his Fed. R. Crim. P. 32(a) right to allocution at sentencing and then failed again to raise the issue on direct appeal); *Sunal v. Large*, 332 U.S. 174 (1947) (defendant failed to appeal district court's refusal to admit evidence of a tendered defense).

A section 2254 proceeding serves a fundamentally different function: to provide a federal forum to review the merits of federal claims that *were* addressed to the state trial and appellate courts. See *United States v. Frady*, 456 U.S. 152, 164-66 (1982), which

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[11/] *See, e.g., United States v. Orejuela*, 639 F.2d 1055, 1057 (3d Cir. 1981); *accord United States v. Jones*, 918 F.2d 9, 10-11 (2d Cir. 1990); *United States v. Redd*, 759 F.2d 699, 701 (9th Cir. 1985); *Tracey v. United States*, 739 F.2d 679, 682 (1st Cir. 1984); *United States v. Holtzen*, 718 F.2d 876, 878 (8th Cir. 1983); *United States v. Rowan*, 663 F.2d 1034, 1035 (11th Cir. 1981).

Respondents have simply ignored.[12/] Because virtually every ruling in a *federal* prosecution involves "the Constitution or laws . . . of the United States," 28 U.S.C. § 2255, the "miscarriage of justice" or "exceptional circumstances" rule is essential to prevent section 2255 motions from becoming a wasteful second round of appeals before the very same courts. But a standard designed to relieve federal courts of the burden of re-reviewing issues they already have or could have addressed, *i.e.*, the section 2255 miscarriage of justice standard, is singularly ill-suited to the task Congress has imposed through section 2254 upon the habeas courts of protecting the properly preserved and presented federal rights (be they constitutional or legal rights) of persons in state custody.

This essential distinction has long been recognized in this Court's opinions, and indeed undergirds the very decisions on which Respondents rely. In *Sunal*, from which *Hill*, *Timmreck*, and *Davis* derive, this Court took pains to note that its discussion focused on habeas challenges to federal rather than state convictions: "So far as convictions obtained in the federal courts are concerned, the general rule is that the writ of habeas corpus will not be allowed to do service for an appeal." 332 U.S. at 178. Although the *Sunal* Court expressly "put to one side comparable problems respecting the use of habeas corpus in the federal courts to challenge convictions obtained in the state courts," *id.*, it cited a series of cases addressing those problems in the state conviction

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[12/] In fact, Congress and this Court have required that state prisoners properly have presented and preserved their federal claims in the state courts before they can present them in federal court. *E.g.*, 28 U.S.C. § 2254(b), (c); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

context, which culminated in *Ex parte Hawk*, 321 U.S. 114 (1944).[13/]

In *Ex parte Hawk*, this Court plainly stated that the exceptional circumstances limitation does *not* apply to habeas review of state convictions where the state prisoner has properly presented and preserved his federal claims in the state courts:

> The statement that the writ is available in the federal courts only "in rare cases" presenting "exceptional circumstances of peculiar urgency," often quoted from the opinion of this Court in *United States ex rel. Kennedy v. Tyler* [269 U.S. 13], 17 [(1925)], was made in a case in which the petitioner had not exhausted his state remedies and is inapplicable to one in which the petitioner has exhausted his state remedies, and in which he makes a substantial showing of a denial of federal right.

321 U.S. at 117-18.[14/]

[13/] *Sunal* and *Hawk* thus establish that, contrary to Respondents' assertion (R. Br. 35), this Court's pre-section 2255 habeas decisions did recognize the distinction between challenges to federal convictions and to state convictions, and treated each kind of challenge accordingly.

[14/] This Court's *dictum* in footnote 10 of *Stone v. Powell*, 428 U.S. at 477 n.10, has generated some confusion concerning collateral review of claimed violations of the "laws . . . of the United States." A careful review of this footnote reveals that it never addresses the situation in this case, *i.e.*, where a state prisoner has properly presented and preserved his federal law claim in the state courts and now presents it in his first section 2254 petition. Because this situation is not addressed, this footnote is irrelevant to the issue *sub judice* in this case.

Moreover, though *Stone* footnote 10 mentions "habeas corpus" as well as section 2255, its discussion reflects a focus on section 2255, which is the context in which most non-constitutional issues arise, to the exclusion of section 2254. The footnote cites only section 2255 cases, starting with *Sunal*, but overlooks the state-federal distinction highlighted by the *Sunal* Court. *See* pp. 13-14, *supra*. Without further analyses, the *dictum* in the *Stone* footnote was placed into the background legal discussion in *United States v. Addonizio*, 442 U.S. 178, 185 (1979), a section 2255 case. *Addonizio*, like *Stone* footnote 10, does not discuss (continued...)

The "miscarriage of justice" standard is applied in section 2254 proceedings only to petitioners who have abused the writ in federal court, or who have procedurally defaulted their federal claims in state court and further have failed to excuse their default or abuse by satisfying the cause and prejudice standard. *See, e.g., Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1721 (1992) (adopting "the narrow exception to the cause-and-prejudice requirement: A habeas petitioner's failure to develop a claim in state-court proceedings will be excused . . . if he can show that a fundamental miscarriage of justice would result"); *Sawyer v. Whitley*, 112 S. Ct. 2514, 2518 (1992) ("even if a state prisoner cannot meet the cause and prejudice standard a federal court may hear the merits of the successive claims if the failure to hear the claims would constitute a 'miscarriage of justice'"); *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991) (abuse of the writ); *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986) (procedural default).

Petitioner has properly preserved and presented his IAD claim: he has exhausted his state remedies, avoided procedural default, and raised the claims in his first and only habeas petition under section 2254. This Court has never applied the "miscarriage of justice" standard to a properly preserved and presented claim under section 2254. Nor should it do so here. With respect to "a claim that is already properly before a federal court, the federalism concerns underlying our procedural default cases are diminished somewhat. By this point, our concern is less with encroaching on the territory of the state courts than it is with managing the territory of the federal courts in a manner that will best implement their responsibil-

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[14/] (...continued)
the section 2254 issue presented here.

Certainly this general background discussion in these two cases, which does not even address, much less critically analyze, the section 2254 issue now before this Court, neither compels nor recommends the adoption of a "miscarriage of justice" standard for evaluating the properly preserved and presented issue in Petitioner's section 2254 petition.

ity to consider habeas petitions." *Keeney*, 112 S. Ct. at 1725 (O'Connor, J., dissenting).

Nothing suggests that Congress intended to make section 2254 petitioners alleging violations of the IAD into third class citizens in the federal habeas courts, relegated to the low level of review given those who default (without cause and prejudice) their constitutional claims. To the contrary, Congress required that tardy trials under the IAD be remedied through dismissal of the criminal charges with prejudice, and then expressly directed all federal courts to enforce the IAD. Adopting the "miscarriage of justice" standard will eviscerate federal enforcement of this federal right and permit -- even encourage -- lax state court enforcement of the timely trial requirements of the IAD.

B. Violations Of The IAD's Speedy Trial Right Are Inherently Prejudicial.

Just last term, this Court held that only those habeas petitioners who assert a "trial error" on collateral review -- that is, an error that "occurs during the presentation of the case to the jury" -- are required to show that the error "had substantial and injurious effect or influence" on the verdict, *i.e.*, that they were actually prejudiced by the error. *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1717, 1721-22 (1993) (internal quotations omitted). In contrast, this Court explained that habeas petitioners who allege and establish an error relating to a "structural defect in the constitution of the trial mechanism" -- that is, an error that by its very nature "infect[s] the entire trial process" -- are entitled to "automatic reversal of the conviction" on collateral review. *Id.* at 1717.

Indiana's violation of the IAD's provisions requiring trial within 120 days or dismissal with prejudice was not a mere "trial error"; rather it was a "structural defect" in the trial mechanism "which infect[ed] the entire trial process." *Id.* But for Indiana's refusal to comply with the IAD's mandatory dismissal requirement, the trial never would have occurred and Petitioner never would have been convicted. Stated differently, by imposing a dismissal with

prejudice remedy on violations of the 120-day trial limit, Congress made crystal clear its view that trial must be had before the expiration of that time limit. Once that time limit expires, as it did here, any trial constitutes a miscarriage of justice. Accordingly, Petitioner is entitled to "automatic reversal of his conviction" on collateral review, *id.*, even under the miscarriage of justice standard.

The United States compares Congress's mandatory dismissal remedy for IAD speedy trial violations with the judicially-created mandatory remedy for Federal Rule of Criminal Procedure 11 violations set forth in *McCarthy v. United States*, 394 U.S. 459 (1969), and points outs that in *Timmreck* this Court refused to grant the same relief in a section 2255 motion alleging a violation of Rule 11. (Amicus Br. 19-20.) This comparison is inapt for two reasons. First, like the exclusionary rule addressed in *Stone*, the *McCarthy* dismissal requirement is a judicially-created remedy emanating from this Court's supervisory power. *See McCarthy*, 394 U.S. at 464. In contrast, the mandatory dismissal requirement of IAD Article V(c) is a congressionally-enacted remedy -- backed up by the IAD section 5 enforcement directive -- which this Court must enforce. Second, as is noted above at 12, *supra*, *Timmreck* is another example of a section 2255 motion brought in an effort to cure a procedural default on direct review. Because the *Timmreck* movant had failed to appeal, he was forced to confront the "miscarriage of justice" standard, which he could not satisfy. Consequently, *Timmreck* and *McCarthy* do not apply here.

IV. THIS COURT CAN AND SHOULD FINALLY DISMISS THE CHARGES AGAINST PETITIONER.

More than a decade has passed since the Indiana trial court denied Petitioner's motion to dismiss and tried him in violation of the IAD's 120-day time limit. During those 10 years, which he has spent in prison on this charge, Petitioner has pursued every required step of the state and federal procedures to have his claim addressed on the merits. Resolving the merits, which were briefed before the

federal district court and court of appeals, should be a simple matter of reading an unambiguous interstate compact, counting the days from the time Petitioner entered Indiana's custody to the date of his trial, and giving effect to the plain language of the IAD, which expresses the will of Congress and the interstate compact obligations to which Indiana agreed. As demonstrated by the very case Respondents cite, this Court may resolve a question not addressed by the court of appeals. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1984).[15] Petitioner's claim should be addressed promptly rather than remanded, which will only cause further delay.

Respondents point out that three courts have rejected Petitioner's IAD claim on the merits (R. Br. 41); they overlook the fact that no two courts have been able to agree on an acceptable rationale. The state trial court confessed ignorance of the 120-day limit after the time had passed (J.A. 113), and its written order denying the motion to dismiss contained no explanation. (J.A. 125.) The Indiana Supreme Court announced a general rule, which Petitioner plainly had satisfied (objection must be made "at the time the date was set or during the remainder of the time limit" (J.A. 157)), but nevertheless rejected Petitioner's claim because he did not object in court on June 27 or August 1 when the trial dates were set (J.A. 157) -- even though the trial court had instructed Petitioner that it preferred written to oral submission. (J.A. 39-40, 123) ("I want it in writing"; "I read better than I listen.").

Given that Article IV(c) expressly imposes an automatic time limit on the states, and that the state prosecutor and trial judge who signed the IAD custody request ignored that time limit and missed

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[15] Likewise, Supreme Court Rule 14.1(a) permits this Court to consider issues subsumed in the question presented, as "[t]he statement of any question presented will be deemed to comprise every subsidiary question fairly included therein." *Id.* As the court of appeals affirmed the denial of petitioner's writ of habeas corpus, the question whether a writ should issue is a subsidiary issue of the instant question presented.

it, the federal district court could not endorse the conclusion that Petitioner, who thrice asked for a timely trial, was the party who defaulted on an obligation of the IAD. Instead, that court turned to Article VI(a) of the IAD and concluded that the pretrial motions Petitioner had filed made him "unable to stand trial" and thus excused Indiana's failure to try him within the 120-day period. (J.A. 195-96.)

Regardless of whether Article VI(a) contemplates that a defendant can become "unable to stand trial" merely by filing pretrial motions,[16] that conclusion was not one the district court could reach. Article VI(a) is a tolling provision which, by its terms, must be invoked by the state court before the trial: "the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, *as determined by the court having jurisdiction of the matter*." Art. VI(a), 18 U.S.C. app. § 2 (emphasis added). The state trial court (and the Indiana Supreme Court) never concluded that Petitioner was "unable to stand trial" for any reason, much less because he had filed pretrial motions. By its express terms, therefore, Article VI(a) precluded the district court from reaching this conclusion as a substitute for the inadequate justifications given by the state courts for their failure to try Petitioner within the time limit of Article IV(c).

No court has reached a satisfactory rationale for permitting the Petitioner's trial to go forward after Indiana just plain missed the 120-day deadline -- because there is no such rationale. After 10 years of incarceration in violation of the IAD, a "law of the United States," this Court should order Indiana to release Petitioner forthwith.

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[16] Furthermore, not one of the Article VI(a) cases that Indiana cites contains any analysis of the issue. In contrast, *Birdwell v. Skeen*, 983 F.2d 1332, 1340-41 (5th Cir. 1993), carefully analyzes Congress's use of the phrase "unable to stand trial" and concludes that that phrase is limited to situations in which a defendant is mentally or physically incapable of proceeding to trial. *See also Stroble v. Anderson*, 587 F.2d 830, 838 (6th Cir. 1978).

CONCLUSION

The "breach of contract" to which Respondents all but confess in their Conclusion was no ordinary breach; it was a violation of an interstate compact and a federal law enacted by Congress in part to ensure the federal speedy trial right that this breach denied Petitioner. This interstate compact specifies a remedy for the breach -- dismissal with prejudice -- and further specifies that "[a]ll courts . . . of the United States . . . are hereby directed to enforce the agreement on detainers . . . ." 18 U.S.C. app. § 5.

After giving the state courts in Indiana a full opportunity to correct their error and to compel the state to perform its obligations under this compact, Petitioner has come to the federal courts seeking enforcement. Nothing Congress has enacted -- either in the Interstate Agreement on Detainers itself or in the Habeas Corpus Act -- and nothing this Court has ever held in addressing either of those two statutes, suggests any conclusion other than to compel Indiana to perform its IAD obligations, to dismiss the charges against Petitioner, and to release him from custody forthwith.

Respectfully submitted,

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